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Office - Supreme Court
FILED
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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 216 Misc.

In the Matter of the Application of

MORRIS BERMAN,

Petitioner-Appellant,

for an Order pursuant to Article 78
Civil Practice Act

—against—

BERNARD J. GILLROY, Commissioner of Housing and Buildings of the City of New York, JOSEPH M. MCNAMARA, as President of the Municipal Civil Service Commission of the City of New York, DARWIN W. TELESFORD and ESTHER BROMLEY, as Commissioners of the Municipal Civil Service Commission of the City of New York, LAZARUS JOSEPH, Comptroller of the City of New York, and SPENCER C. YOUNG, Treasurer of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MORRIS BERMAN, Petitioner, prays that a writ of certiorari issue to review the judgment and decision of the Court of Appeals of the State of New York entered in the above entitled proceeding on April 16th, 1953.

Opinions Below.

The opinion of Justice EDER of the New York Supreme Court, First Judicial Department, was entered April 27th, 1950, and reported 198 Misc. 369 and 27 N. Y. Supp. 2d series 321. The dissenting opinion of Justice SHIENTAG of the Appellate Division of the N. Y. Supreme Court, First Judicial Department (Memorandum), was entered June 12, 1951 and reported 278 App. Div. 907 (105 N. Y. Supp. 2d 521). The Court of Appeals rendered no opinion.

Jurisdiction.

(Please note Affidavit as to Jurisdiction, Letter to the Court requesting appearance as to Jurisdiction and the following.)

The decision of the Court of Appeals was rendered April 16th, 1953, and the motion for reargument denied May 29th, 1953. Extensions of time within which to file a certiorari petition were granted by Mr. Justice JACKSON of this Court on August 11th and September 14th, 1953, extending the final time of filing to October 26th, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3). At all times in the proceeding, brought under Section 78 of the N. Y. Civil Practice Act, the petitioner's citation of a constitutional provision were under review, *in all of the lower courts,* to wit: page 97, folio 291:

> "there is no precedent for such a charge ever to have been heard except under the guarantee of *Article VI of the United States Constitution,* which states, in part, 'the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense'."

More specifically, the constitutional issues were raised before the Court of Appeals in the brief of appellant, page 3:

> "* * * are set forth in the brief as Amicus Curiae of the Community Councils of the City of New York, Inc. That brief, as well as a brief of the * * * are hereby made a part of the instant brief."

Referring to said Community Councils brief (Court of Appeals):

POINT VI. (Page 12).

Section 22 of the New York State Civil Service Law is unconstitutional, as it does not provide equal protection under the law (Article XIV, United States Constitution) * * *.

POINT VII (Page 13).

The search and seizure of the person and property of the appellant as attested to (156, 3) constitute serious violations of the United States Constitution, and any and all consequences of such illegal search and seizure should be voided by the Court * * *.

POINT VIII (Page 14).

The departmental action on the identical charge of which the appellant had already been cleared by the Court constitutes double jeopardy prohibited by Amendment Article V of the United States Constitution.

POINT IX.

Considering the nature of departmental charge 1, the opportunity for producing witnesses, of confronting opposing witnesses and counsel should have been allowed the appellant by the Department head. This was not merely a civil matter, but a repetition of an already discredited criminal charge,

and, as such, the appellant was entitled to the full protection of the law under Amendment Article VI of the United States Constitution.

POINT XII (Page 15).

By the respondent's act in purporting, by departmental "trial", to try a legal issue already passed upon by the Court of General Sessions and clearly beyond his executive jurisdiction, he has usurped the function of the courts, and this act is contrary to the State Constitution and to Chapter 26 of the Charter and Administrative Code of the City of New York. (Herein inserted: misuse of power "under color of law", U. S. Supr. Ct. 62 S. Ct. 51.)

In MOTIONS before the Court of Appeals

Motion 1 (Reargument) refers to above points in Community Councils brief (U. S. Constitution) in paragraph (a)

Motion 3 (b) asks amendment of remittitur (also [a] under Title 28 of the U. S. Code) so that Constitutional questions may be argued. Denied.

Statute Involved.

The New York State statute, validity of which is involved, is Section 22, Article 2 of the Civil Service Law, given in Appendix A. The date of the judgments or decrees to be reviewed are those of the N. Y. Court of Appeals of April 16, 1953, as to the proceeding, and May 29, 1953 as to denial of motions. (Motions in Appendix F) including motion to amend remittitur showing constitutional questions and permission to argue same.

Questions Presented.

1. Whether Article 2, Section 22 of the N. Y. Civil Service Law is constitutional, since it denies right of counsel

and witnesses to non-veteran employees only, even when the charges are criminal in nature. (Appellant's Brief Court of Appeals, page 3, Par. 3 and Community Council's brief Point VI, p. 12.) *Wood* v. *Philadelphia,* 17 Pa. Dist. 1022, *People* v. *Sherwin,* Article XIV, U. S. Constitution.

2. Whether a government employee may be dismissed as a result of an illegal search and seizure and a "confession" obtained by physical beating and duress. (Page 3, Appellant's Brief in Court of Appeals referring to Point VII in Community Councils Brief in Appendix, Article IV, U. S. Constitution.)

3. Whether a government employee may be placed in double jeopardy by publicly proclaiming criminal guilt through a departmental dismissal though cleared of such charge by the Courts. (Article V, U. S. Constitution, page 3, Appellant's Brief in Ct. of App. referring to Point VIII in Community Council's brief p. 14).

4. Shall counsel and witnesses be allowed a government employee in a departmental action for dismissal when such charges are essentially criminal in nature? (*U. S.* v. *Wickersham,* 201 U. S. 390, 26 S. Ct., p. 3, Appellant's brief in Ct. of App. referring to Point IX, p. 14, Community Councils brief, p. 14.)

5. Shall a government employee be dismissed by a department administrator under color of law on a criminal charge of which he has already been cleared by the courts having jurisdiction? (*U. S.* v. *Classic,* 61 S. Ct. 1031, 62 S. Ct. 51, p. 3 of Appellant's Brief in Ct. of App. and Point XII p. 15 of Community Council's brief.)

Statement.

The Petitioner had been a civic worker (without compensation) in the City of New York for years and was publicly recognized for his work in numerous newspaper editorials and articles (Biography, Appendix C). When he first

became a plan examiner for the fire prevention bureau of the Fire Department of the City of New York in 1930 (to 1934) he was not hindered in enforcing the law, but from 1934 to 1949 as plan examiner and civil engineer in the Department of Housing and Buildings, he found law enforcement to be greatly resented by city officials. Such resentment and policy on the part of Gillroy (hereinafter termed respondent) is shown in an editorial in a Scripp-Howard newspaper, Appendix C. That such resentment of appellant's conscientious enforcement of the law was chiefly responsible for his dismissal is stated on page 101, folio 302 of the Record. False departmental charges were constantly being made against the appellant at the instigation of the respondent (Appellant's Brief page 3 to Court of Appeals), referring to Point IV (page 8), of the Community Councils brief. The charges filed August 23, 1949 (pp. 50-52) finally leading to dismissal on December 28, 1949 were no exception, in that they were absolutely unfounded. Their lack of foundation is easily shown in an official report by the Hon. FRANK S. HOGAN, District Attorney of New York County (pp. 30-35 of Record). It so happened that appellant, who is a violinist, taught a boy in his boy's home several times without knowing said boy was involved in immoral conduct with men (sodomy); when the boy was finally apprehended, his mother decided for reasons not in the record, to involve the appellant. She later denied the charge and so did the boy in question, without reservation (pp. 30-35, p. 37, fol. 218). *There is nothing in the record to show that appellant had ever even heard of sodomy nor that he was familiar with its meaning.* Deputy Commissioner Grossman, who conducted the departmental investigation, could find no evidence of such misconduct on the part of the appellant and recommended against dismissal (p. 110, fol. 329), as did the office of the City's Chief Financial officer (Community Councils brief, Appendix, Exh. B, pp. 31-33). But respondent's pattern of unwarranted charges was clear. In previous city administrations he was re-

strained from taking the ultimate step of eliminating a conscientious employee, but the way was now open for him *politically* in the O'Dwyer administration, found by the U. S. Senate Investigating Committee to have criminal alliances. The appellant did not choose to appeal to [said] (the Civil Service) Commission, whose members could be removed by Mayor O'Dwyer, but appealed to the State Supreme Court instead on March 21, 1950. While his excessive awards to referees be appointed were given as a reason, his intense affiliation with partisan politics was probably a large contributing factor. An appeal was then made to the Appellate Division of the State Supreme Court, which affirmed the lower court's decision on June 12, 1951, with one justice (SHIENTAG) dissenting in a separate Memorandum. On July 2, 1951 an appeal was taken to the State Court of Appeals, which affirmed the decision of the lower court on April 16, 1953. Numerous appeals to former Mayor O'DWYER by civic organizations on behalf of the appellant went unheeded (pp. 130-145).

Specification of Errors to be Urged.

The State Court Appeals erred:

1. In considering the alleged "confession", obtained by brutality and rejected by a court having jurisdiction (Court of General Sessions) and totally discredited, all complaints having been withdrawn.

2. In failing to reverse the lower courts on U. S. Constitutional grounds (*supra*).

3. In failing to allow a rehearing on Constitutional grounds (*supra*) Motions appended.

4. In failing to order sealing of record as to the alleged confession, already done by the State Supreme Court in another case (*Berman* v. *N. Y. Soc.,* Point XVII Community Councils Brief appended) Motions appended.

5. In permitting double jeopardy contrary to the U. S. Constitution.

6. In failing to reverse the order of the State Supreme Court.

7. In failing to reverse order as to charge 1, and charge 2 of departmental charges, both without foundation.

8. In failing to hold that a departmental charge may not be brought based upon a fully retracted criminal charge which a district attorney refuses to prosecute, for which departmental charge so made there is no precedent.

9. In failing to clear appellant of a criminal charge for a heinous offense, made without acceptable evidence whatsoever.

10. In failing to hold that appellant was beaten and threatened into signing an alleged confession.

11. In failing to find that appellant was falsely accused.

12. In failing to find the respondent's action arbitrary and capricious.

13. In failing to find that, there being no corroborative proof of appellant's guilt, it was improper for respondent to consider the alleged confession and to base his determination of appellant's guilt thereon.

14. In failing to make due allowances for appellant's high reputation in his community as attested to in the Record.

Reasons for Granting the Writ.

1. Courts have repeatedly held that a department head may *not* dismiss an employee in bad faith, even if courts

will not question power to do so in good faith. The facts herein stated are so overwhelming in favor of the employee, and so void of evidence to the contrary, that capricious and wilful conduct on the part of the respondent may be presumed. In *U. S.* v. *Wickersham,* 201 U. S. 390, 26 S. Ct., the court held "He was therefore entitled to the protection of the President's order, * * *" no removal shall be made from any position subject to competitive examination except for just cause and upon written charges * * * and of which the accused shall have full notice *and an opportunity to make defense.* In *Roe* v. *Doherty,* 1940, 260 App. Div. 260, 284 N. Y. 550, the Court held,

> "There must be substance to the charges, and * * * the explanation must be passed upon fairly and in good faith and not arbitrarily or from some ulterior motives."

Respondent's repeated contentions that he may dismiss any of his public employees at will is erroneous and a highly dangerous interpretation—particularly in a municipal administration generally believed to be influenced by criminal forces and where an employee is highly conscientious and out of sympathy with such forces.

It is, particularly incumbent upon those who enforce laws to protect innocent victims of moral smears. In the *Matter of Lynch's Builders' Restaurant* v. *O'Connell,* 277 App. Div. 705, 712 (since reversed, but this opinion applies fully to innocent parties), the Appellate Court in New York held:

> "The nature of this charge and the popular feeling of revulsion which it engenders should cause the court to be especially careful to weigh the record dispassionately in order to ascertain whether it contains substantial evidence on which to base a determination by

the authority, however well intentioned, that destroys at one blow the estate, reputation and livelihood of the man * * *."

Attention of the Court is directed to the fact that in this cause there was no evidence left at all upon which a dismissal could be based. The department head, in his investigation, did not question original "witnesses", since these were non-existing, and instead questioned two agents—not on facts but on a discredited confession. This again proves motivation and prejudice beyond a doubt—if either agent, guilty of beating appellant for a false confession (as sworn to by the witnesses, and corroboration by a sworn affidavit of the district attorney) told the truth, he would have subjected himself to a long prison term; of course such testimony should have been expunged from the record by the Court on its own motion, but instead, it was actually acted upon in one of the most cruel decisions ever to have been made in legal history, and in opinions which play upon words and thoroughly ignore the total lack of evidence, assault and battery against the appellant and the practice of torture and cruelty against him. (The cases cited in the opinion are inapplicable here, [Addenda to Reply Brief, *infra*].) The high political prejudice of the justice was so intense that he ignored the finding of innocence on the part of the Court of General Sessions, the deputy commissioner who presided at the departmental investigation and the total withdrawal of charges. The Record references pages 130 to 147 show opinions of the appellant from leaders not only of the New York Community, but of the entire nation. The World-Telegram editorial appended shows the utter lack of confidence in the respondent in his community.

Referring to the discriminative Section 22 of the N. Y. Civil Service law, Corpus Juris Section 460 states, in a parallel case,

"A statute which exempts veterans from the necessity of taking a competitive examination has been held unconstitutional. Wood v. Philadelphia, 17 Pa. Dist. 1022." The discrimination against non-veterans of the N. Y. Section 22, Civil Service law, is even more pronounced, as non-veterans may not have a witness or counsel, even where the charge is essentially criminal in nature.

Conclusion.

If the decisions of the lower courts are allowed to stand, an era of character assassination against public employees will be initiated, with the full sanction of law—particularly against employees who resist the unlawful forces and influences, or totalitarian influences about them, such as powerful though secret forces of communism in our midst; dismissal by torture and unlawful seizure will be encouraged, and will multiply. It will be an open invitation to police brutality and star chamber proceedings on an immense scale which we so loudly condemn in totalitarian countries.

For these and the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORRIS BERMAN,
Petitioner, In Personam.

October 26, 1953.

Appendices.

A—Section 22 of the N. Y. Civil Service Law (one copy with Record, extract herewith).

B—Brief as Amicus Curiae of the Community Councils of the City of New York, Inc., to the Court of Appeals (with Record).

C—Editorial, N. Y. World-Telegram (with Record).

D—Biography, "Who's Who in New York" (with Record).

E—Letter to the N. Y. Court of Appeals (with Record).

F—Motions to the N. Y. Court of Appeals (with Record).

G—Letter to N. Y. Court of Appeals by attorney pleading against own client. (Note: Letter sent with original permission of attorneys.)

Appendix A.

(Extracts from Section 22, Civil Service Law of the State of New York.)

Section 2. Removals generally. No officer or employee holding a position in the competitive class of the civil service * * * shall be removed except for incompetency or misconduct. The person whose removal is sought shall have written notice of such proposed removal and the reasons therefor * * * and shall be allowed a reasonable time for answering the same in writing. * * *

Section 1. No (war veteran or volunteer fireman) * * * shall be removed from such position except for incompetency or misconduct *shown after a hearing* * * *.

Appendix G.

COPY

April 2, 1953

Clerk
Court of Appeals

Court of Appeals Hall
Eagle Street
Albany, N. Y.

Re: Berman v. Gillroy

Cal. No. 337

Dear Sir:

It has come to the attention of this office that our client the appellant in the above matter, has obtained permission to file an additional brief therein. This office feels that no further papers should be submitted to the Court in this matter and that the issues have been adequately presented in the four briefs heretofore filed. In fact, we feel that our client's case would be hurt by such filing.

We would like therefore, to go on record as opposed to the above filing and to request that no further briefs be accepted by you.

Very truly yours,

(Signed) WILLIAM KUNSTLER

WMK:dg

Addenda to Reply Brief.

New York Supreme Court Decision Without Legal Precedent. The decision of Justice Eder (97 N. Y. Supp. 2d 521), is based upon two New York cases:

Wood v. *Board of Health,* 102 N. Y. 610, and

People ex rel. Cunningham v. *Bingham,* 154 App. Div. (N. Y.), 602.

But in both of these cases, there was *no* departmental trial of issues already decided by the courts, but on different issues; thus, Wood was cleared of one crime in court, and tried on assault in the Department; Cunningham was cleared of bribery in court, but tried on neglect of duty in his department; *in the instant case the very same charge* of which the Petitioner was cleared in the court, is repeated, *word for word* by the Department, and the respondent here *usurps the function of the courts,* using power he does not possess under color of law. A second charge (lateness) absolutely unfounded (and which has never been upheld for purposes of dismissal in New York for the trivia indicated) is added for good measure. The respondent, in his lengthy and official-sounding decision*, covers lack of facts with judicial-sounding terms he had no legal basis to employ, setting himself up as a judge over and above the New York courts; terms such as:

"incredible"
"fantastic"
"fabrication" et cetera.

He was actually trying the case all over again, without the benefit of having even sat in at the "hearing" in his own department in which petitioner was cleared, and without the benefit of outside material evidence he could have obtained.

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*Analysis of this in Community Councils brief.

Other Violations of Due Process Apparent from the Record.

1. **Page 106, folio 317.** ***Denial of Medical Examination after police station beating:***

> "Mr. Steinhart (Petitioner's Counsel): He claims he was beaten and punched and kicked in the belly.
>
> The Court: If he was beaten that way there would be some evidence of it.
>
> Mr. Steinhart: We ask for an examination, your Honor.
>
> The Court: All right, ask for the examination. I have no jurisdiction over it."

Such examination was not only denied by the Court, which, it is believed *had* jurisdiction, but also by other officials who might have granted same.

2. *Denied Right to an Immediate Arraignment.*

Although petitioner was taken to a police station at approximately 6 P.M. on one day (Record, p. 158, 3d line of affidavit, and statement by Mansfield, p. 91, 3d line, "night of October 9, 1948) he was not taken before a Magistrate until (after noon of) the next day (p. 106, fol. 314). It is apparent that the delay was deliberate, in order that the body marks from the physical beating to which the petitioner was subjected might lessen in the meantime. The New York laws require an immediate arraignment, which could have, and should have been effected, since the City has night courts.

Errata in Reply Brief.

Page 17, end of paragraph at center of page, parentheses should read: (Appendix G of Petition). Generally, "Community Council's" should read "Community Councils".

Page 8, 3d line, "late" should be "fast".

Page 9, last line, "are" should be "is".

Already probably corrected:

Page 21 last line of paragraph in italics, "for" should be "or".

Page 22, line 9, add "to" before "protect".

(34125)

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FILE
DEC 1
HAROLD B. WILL

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Respondents.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

Petitioner, an employee holding a position in the Civil Service subject to competitive examination, asks this Court to review a determination of the New York Courts denying his application for an order in the nature of peremptory mandamus to set aside the determination of the Com-

missioner of Housing and Buildings of the City of New York dismissing petitioner after he had been accorded an opportunity to explain a charge of misconduct. Reported below: 198 Misc. 369; affd. 278 App. Div. 907; affd. 305 N. Y. 688.

Facts

Petitioner held the position of Assistant Engineer in the Department of Housing and Buildings in the City of New York. The position is classified in the Competitive Class of the Civil Service and since petitioner is not a veteran he was not entitled to a hearing. His protection from summary removal is subd. 2 of §22 of the Civil Service Law, reading as follows:

> 2. *Removals generally.* No officer or employee holding a position in the competitive class of the civil service of the State, or any civil division or city thereof, shall be removed except for incompetency or misconduct. The person whose removal is sought shall have written notice of such proposed removal and of the reasons therefor, and shall be furnished with a copy of any charges preferred against him, and shall be allowed a reasonable time for answering the same in writing. * * *"

Petitioner was suspended from duty on October 14, 1948 (R. p. 48) because of his arrest by agents of the Society for the Prevention of Cruelty to Children on a complaint of having impaired the morals of a nine year old boy (R. pp. 32, 61, 63). An indictment on this complaint was filed in the Court of Special Sessions on November 16, 1948 (R. p. 29). This indictment was dismissed on June 16, 1949 on the recommendation of the District Attorney (R.

p. 29) because of his opinion that he could not establish the guilt of petitioner "beyond a reasonable doubt" (R. p. 35).

Departmental charges, which had been deferred during the pendency of the criminal complaint (R. p. 42), were served upon petitioner on September 30, 1949 (R. p. 43). These charges specified (1) acts of sex perversion with a nine-year old boy, and (2) twenty-eight instances of unexcused lateness in arrival at his place of employment and two instances of absence from duty (R. pp. 50-52).

Petitioner submitted a written answer to the charges, consisting of a general denial of the first specification and his assertion that the acts charged in the second specification were excusable (R. pp. 24-27).

Although Section 22 of the Civil Service Law does not provide for a hearing upon charges made against a non-veteran, the Deputy Commissioner nevertheless called as witnesses the two officers of the Children's Society, Mattarazo (R. pp. 60-66) and Mansfield (R. pp. 90-95) who had arrested petitioner. Petitioner testified in his own behalf (R. pp. 67-89).

Deputy Commissioner Grossman made a written report of his findings and recommendations. He found as to the first specification that it had not been proven (R. p. 109) "beyond a reasonable doubt" and that the Department of Housing and Buildings did not have jurisdiction of the charge because (R. p. 110) "the incident involved occurred at a location removed from the Department and not during working hours." He recommended the dismissal of this charge (R. p. 110).

Deputy Commissioner Grossman found petitioner guilty of the second specification and, since petitioner had been found guilty before on similar charges, he recommended that petitioner be suspended without pay for sixty days (R. p. 111).

Commissioner Gillroy's decision appears at pages 112-118 of the record. He disregarded Deputy Grossman's recommendations as to the first specification and found petitioner guilty of both charges. He stated in part (R. p. 113):

> "Berman's explanation of his reason for asking Kenneth Wylie's mother for permission to take her son to Central Park is fantastic. Berman, a middle-aged man claims he wanted the nine year old Kenneth Wylie along as a chaperon to a female adult.
>
> Although he says he did not consider Kenneth Wylie a good pupil [for violin lessons] he states that he left his address in the boy's home. He gave the name Martin Bernfeld to the Wylie children as testified to by Officer Mattarazo. There is a natural conclusion that he sought to conceal his name.
>
> Berman's answer to the question as to whether he was in a place called Castle Lake, Central Park, is strange in that he says he probably never heard of it. He must have known there was a lake in Central Park else he would not have invited a girl to go on a lake in Central Park. That he is not familiar with at least a portion of Central Park, I cannot believe, as he resides on Central Park West."

Our understanding of petitioner's application is that he claims:

1. That his occupancy of the position of Assistant Engineer in the Civil Service of the City of New York constituted property.

2. That section 22 of the Civil Service law, under which the proceedings leading to his dismissal were conducted, violates the fourteenth amendment to the Constitution of the United States since it deprives him of property without due process of law by providing a greater measure of protection from sum-

mary removal (a hearing) to veterans and granting to non-veterans only an opportunity to explain charges.

3. That his dismissal upon the first specification of the charges violates the fifth amendment of the Constitution since it placed him in double jeopardy because the acts upon which that specification is founded were the substance of a criminal indictment which was dismissed.

In opposition to petitioner's application we argue as follows:

1. That petitioner did not reserve the questions he now raises for review by this Court since he did not present these questions in the Courts below.
2. That petitioner's occupancy of a civil service position did not constitute property.
3. That petitioner's being called upon to answer a charge of misconduct based upon facts constituting a crime of which petitioner had been acquitted was not prejudicial to his rights.
4. That the right of tenure in a position in the civil service of a municipality does not present a Federal question.

ARGUMENT

1

Although petitioner was represented by different attorneys on two separate occasions (R. pp. 49, 54) prior to the hearing upon the charges, he appeared upon the return day specified in the notice of hearing without counsel and he made no request at any time during the hearing for the opportunity of being represented by counsel. One of the law firms which represented petitioner in the early stages of the matter (R. p. 54) later appeared as his attorney upon appeals to the Appellate Division (R. p. 2) and to the Court of Appeals (R. p. 168). Petitioner's counsel did not urge any constitutional question in either court. The questions were not raised in the proceeding until a brief was submitted *amicus curiae* in the Court of Appeals.

Since petitioner did not raise the constitutional question in the court below, he may not do so in this court. *Denver Stockyard Co.* v. *United States,* 304 U. S. 470, 484-485 (1937); *Duignan* v. *United States,* 274 U. S. 195, 199-200 (1927); *American Tobacco Co.* v. *Werckmeister,* 207 U. S. 284, 302 (1907).

2

The unanimous judicial authority is that public office or employment is not property within constitutional provisions guaranteeing its enjoyment. *Taylor and Marshall* v. *Beckham (No. 1),* 178 U. S. 548, 577 (1900); *Snowden* v. *Hughes,* 321 U. S. 1, 7 (1943); *Smith* v. *City of New York,* 37 N. Y. 518 (1837); *Sharkey* v. *Thurston,* 268 N. Y. 123, 127 (1935); *Green* v. *State Civil Service Commission,*

90 Ohio State 252 (1914); *People ex rel. Reilly* v. *City of Chicago,* 337 Ill. 100 (1929).

Under the New York State Constitution the rights of incumbents of offices and employments, other than incumbents of constitutional offices, are statutory only. New York State Constitution, Art. 13, §6; *People ex rel. Cline* v. *Robb,* 126 N. Y. 180, 182-183 (1891); *People ex rel. Devery* v. *Coler,* 173 N. Y. 103, 114 (1903).

3

The provisions of subdivision 2 of §22 of the Civil Service Law according to non-veterans "an opportunity to explain charges", which procedure has been held not to require a hearing *People ex rel. Kennedy* v. *Brady,* 166 N. Y. 44 (1901), does not abridge petitioner's privileges as a citizen simply because subdivision 1 of that section grants the right to a hearing upon charges made against a veteran. This very objection was overruled in *People ex rel. Kenny* v. *Folks,* 89 App. Div. 171, 176 (2nd Dept., 1903). See also *Taylor and Marshall* v. *Beckham* (No. 1), 178 U. S. 548, 573 (1900).

4

Petitioner's rights under the due process clause of the Fifth Amendment to the Constitution of the United States were not infringed by reason of the fact that the first specification of the charge against him arose out of the acts upon which a criminal complaint was made against him. *Bailey* v. *Richardson,* 182 Fed. 2d, 46, 57, affd. 341

U. S. 918; *Angilly* v. *United States,* 199 Fed. 642 (1952); *Croghan* v. *United States,* 89 Fed. Supp. 1002 (1950); *People ex rel. Wood* v. *Department of Health,* 144 App. Div. 628 (1st Dept., 1911), affd. 202 N. Y. 610 (1911); *Matter of Cassidy,* 268 App. Div. 282 (2nd Dept., 1944), affd. 296 N. Y. 926 (1947).

5

The removal of a state or municipal employee from public employment does not present a federal question. *Preston* v. *Chicago,* 226 U. S. 447 (1913); *Walton* v. *House of Representatives of Oklahoma,* 265 U. S. 487 (1924).

CONCLUSION

The application for a writ of certiorari should be denied.

November 30, 1953.

Respectfully submitted,

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Attorney for Respondents.

SEYMOUR B. QUEL,
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of Counsel.

FILED
DEC 30 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 216 Misc.

In the Matter of the Application of

MORRIS BERMAN,

Petitioner-Appellant,

for an Order pursuant to Article 78
Civil Practice Act

—against—

BERNARD J. GILLROY, Commissioner of Housing and Buildings of the City of New York, JOSEPH M. MCNAMARA, as President of the Municipal Civil Service Commission of the City of New York, DARWIN W. TELESFORD and ESTHER BROMLEY, as Commissioners of the Municipal Civil Service Commission of the City of New York, LAZARUS JOSEPH, Comptroller of the City of New York, and SPENCER C. YOUNG, Treasurer of the City of New York,

Respondents.

APPELLANT'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR A WRIT OF CERTIORARI.

MORRIS BERMAN,
393 Central Part West,
New York 25, N. Y.,
Appearing In Persona.

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